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Supreme Court, U.S.
FILED
SEP 12 2003
OFFICE OF THE CLERK

No. 02-1265

IN THE
Supreme Court of the United States

EXXONMOBIL GAS MARKETING COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SECOND SUPPLEMENTAL BRIEF

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SECOND SUPPLEMENTAL BRIEF

On August 14, 2003, the Federal Energy Regulatory Commission (FERC) issued a notice of a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." FERC Supp. Br. App. 1(a). In the notice, FERC concedes that the test it applied below (the *Sea Robin* test, *id.* at 6a-8a) is arbitrary and unworkable. FERC characterizes its efforts to formulate a functional test as "resembl[ing] the pursuit of a desert mirage." *Id.* at 3(a). FERC admits that the *Sea Robin* test brings a "high degree of uncertainty" to offshore jurisdictional determinations; grants "[s]ystems with generally similar physical characteristic[s] ... a different regulatory status because of relatively minor physical differences"; "produce[s] different regulatory results for competitors who perform essentially the same economic function"; and "unfair[ly]" subjects producers "who may have made investments relying on the regulated status of the transporter ... to the market power of that transporter in its new deregulated form." *Id.* at 9a-10a. Most importantly, FERC concedes that the test it employed below is contrary to the statute: "inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS." *Id.* at 10a.

In the notice, FERC also asks for comments regarding its authority to deny an application for abandonment under section 7(b) of the NGA. Specifically, the Commission asks whether it has authority to deny the abandonment by transfer to another company of certificated facilities that are subsequently found to perform a gathering function. *Id.* at 11a. The question implicitly poses the issue already resolved in opposite ways by the D.C. Circuit and the Fifth Circuit: Does FERC have the authority to deny abandonment in such circumstances unless FERC first determines that

abandonment is in the public interest? See Petitioners' First Supp. Br. 2-3.

On the jurisdictional issue, FERC's new diagnosis of the problems with the *Sea Robin* test is exactly right (and reflects the position of petitioners), but its proposed remedy is wrong. FERC in its supplemental brief urges the Court to deny this petition, and the related petition in No. 02-1215, while it reconsiders what factors to add to (or delete from) its test, and what weight to give such factors. FERC Supp. Br. 4-5, app. at 11(a). FERC maintains that the basic jurisdictional terms "transportation" and "gathering" in section 1(b) of the Natural Gas Act are ambiguous, and that their interpretation is committed to the FERC under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). FERC Supp. Br. 4-5. FERC contends that this Court should deny review because the issue under the NGA is whether the Commission's new test would be a reasonable interpretation of the statute under *Chevron*. *Id.* at 5. As to the abandonment issue, FERC is silent as to why this Court should deny review of the issue pending the Commission's action, if any, emanating from its newly announced conference.

While FERC is right to question the positions it has taken under sections 1(b) and 7(b) of the NGA, its eleventh-hour notice of conference forms no basis to deny the petitions. Instead, the notice reinforces the urgent need for this Court to grant the petitions. On the jurisdictional issue, any future reformulation of the *Sea Robin* factors will not cure the fundamental conflict between the decision below and this Court's authoritative construction of section 1(b). Similarly, on abandonment, any future action by the Commission cannot resolve the split between the D.C. Circuit and the Fifth Circuit. If the Commission changes its mind, it will not be the first time, as the Commission's original position was in line with that of the Fifth Circuit. See *Trunkline Gas Co.*, 67 F.E.R.C. ¶ 61,256, 61,859 & n.17 (1994). Currently, it agrees

with the D.C. Circuit. Delay to allow FERC time to reverse itself again will not obviate the need for this Court to resolve the conflict.

1. On the issue of jurisdiction, FERC advises this Court to deny the petition on the claim that interpretation of section 1(b) is committed to the discretion of Commission under *Chevron*. That is wrong, and begs the question to be resolved by this Court. Petitioners' position (like that of Judge Edwards in dissent) is that the decision below on jurisdiction is contrary to this Court's authoritative construction of section 1(b) in *Northern Natural Gas Co.* v. *State Corp. Commission*, 372 U.S. 84 (1963), and other precedents. The central error of the court of appeals is its holding that the basic jurisdictional terms of section 1(b) of the NGA are ones of "inherent ambiguity," Pet. App. 18a, and that federal jurisdiction is determined by any line drawn by FERC that is not "patently unreasonable." *Id.* at 19a-20a (internal quotation marks omitted). To the contrary, this Court has definitively construed section 1(b) to incorporate the distinctions drawn in Commerce Clause jurisprudence at the time of the NGA's enactment, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684 (1954), and in particular has held that the term "gathering" is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." *Northern Natural*, 372 U.S. at 90.

In the NGA, Congress did not extend federal statutory jurisdiction to the full domain of interstate commerce, but did grant the FERC exclusive jurisdiction over "that interstate segment which the states were powerless to regulate because of the Commerce Clause" – namely, interstate sales for resale and interstate transportation. *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503, 510 n.15 (1949). States were not entitled to regulate interstate transportation, but could regulate the "preparatory gathering" of goods *prior* to interstate transportation. *Hughes Bros. Timber Co.* v. *Minnesota*, 272 U.S. 469, 475 (1926); *Carson Petroleum Co.* v. *Vial*, 279 U.S.

95, 102-03 (1929). States could thus regulate and tax the "gathering" of natural gas, but only if there was an identifiably "distinct local activity" of gathering that could be differentiated from "a separate movement in commerce." *Michigan-Wis. Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954). These Commerce Clause distinctions were incorporated in the NGA, subject to the rule that exemptions from NGA jurisdiction should be strictly construed. *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690-91 (1947). Accordingly, this Court ruled in *Northern Natural* that the "gathering" exemption from FERC jurisdiction is "narrowly confined to the physical act[] of ... preparing [gas] for the first stages of distribution." 372 U.S. at 90. As Judge Edwards stated in dissent below, any FERC determination of "gathering," without identification of a distinct physical act of preparing the gas for further distribution, "is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*" Pet. App. 35a.; see Pet. 10-22; Reply Br. 1-4.

Thus, the jurisdictional question presented by this petition is a *Chevron* Step 1 question. The reasonableness of any possible future reformulation of FERC's "gathering" test under *Chevron* Step 2 is irrelevant because FERC does not have authority to depart from this Court's authoritative construction of the statute in *Northern Natural* and the other precedents cited above. *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536-37 (1992); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). The fundamental question of statutory interpretation presented by this petition will thus be unaffected by any future rulemaking FERC undertakes pursuant to the August 14, 2003 notice. Indeed, if anything, this Court should resolve this fundamental question first so that the FERC can formulate a new test in line with this Court's guidance.

2. Similarly, on the abandonment issue, petitioners contend that, as a matter of the plain meaning of section 7(b) of the

Act, FERC cannot permit a pipeline to abandon jurisdictional service without finding that such abandonment is in the public interest. Pet. 22-27; Reply Br. 6-7. The abandonment ruling below has resulted in an acknowledged circuit split, see Petitioners' First Supp. Br. 2-3, and this critical issue cannot be left unresolved over the potentially lengthy period of FERC's reconsideration. Only this Court can finally resolve the conflict between the circuits.

3. In all events, FERC's admission that the *Sea Robin* test applied below is arbitrary and inconsistent with the NGA, and FERC's rethinking of whether the D.C. Circuit or the Fifth Circuit is right on the abandonment issue, are not grounds for denying the petitions. They instead provide strong reason for this Court to *grant* the petitions and resolve the questions presented, or at a minimum, to grant the petitions, vacate the judgment of the court of appeals and remand the case so that FERC can reconsider the correct disposition of this case in light of any revised standards. An agency's second thoughts are not a basis for allowing a judgment based on erroneous legal rules that are the subject of clear and important conflicts of authority to become final.

FERC is wrong to suggest that the question of the proper classification of the Sea Robin system could be revisited after it reformulates its offshore gathering test in a separate rulemaking. FERC Supp. Br. 5. Under current FERC precedent upheld by the D.C. Circuit, Sea Robin is free at any time to transfer its newly designated gathering facilities to an unregulated affiliate or independent company (as other OCS pipelines have already done) without any public-interest review by FERC. Petitioners' First Supp. Br. 1, 3, App. 14a-19a. Once such a transfer is final and the Sea Robin system is broken up into two different systems, the jurisdictional status of the *current*, single interstate Sea Robin pipeline system cannot be redetermined later. The reliance interests of Sea Robin's captive producers will be prejudiced.

In sum, the questions presented concerning NGA regulation of OCS pipelines are extraordinarily important and require immediate resolution. OCS pipelines are being rapidly deregulated from NGA jurisdiction under a *Sea Robin* test that the FERC now admits is arbitrary and contrary to the statute, and an abandonment rule that allows certificated pipelines to be transferred to nonjurisdictional pipeline companies without any finding that abandonment is in the public interest. As FERC concedes, captive producers who have relied on the NGA regulation of an OCS transportation pipeline in making investment decisions "find themselves subject to the market power of that transporter in its new deregulated form." FERC Supp. Br. App. 10a. That is contrary to the very purpose of the NGA, which is to protect producers and the public from the monopoly power of interstate pipelines. *Public Serv. Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327 (1983). In a time of substantial concerns over the nation's supply of natural gas, regulatory uncertainty and pipeline market power on the OCS – the nation's largest single source of natural gas – are simply untenable. This Court's review is imperative.

CONCLUSION

The petition should be granted and the questions presented decided by this Court. Alternatively, the petition should be granted, the judgment below vacated and the matter remanded so that the FERC can apply any new standards it devises to the Sea Robin system.

Respectfully submitted,

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